Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-993–06 OF 2015 AND B-02(NCVC)(W)-1100–07 OF 2015

LIM YEE LAN, MOHD ZAWAWI SALLEH AND VERNON ONG JJCA

29 FEBRUARY 2016

Contract — Tenancy agreement — Breach — Plaintiff entered into master tenancy agreement with first defendant as landlord — First defendant entered into tenancy agreement with third defendant over same subject property whilst master tenancy agreement still subsisting — Third defendant entered into subtenancy agreement with fourth defendant — Whether first defendant failed to give vacant possession of subject property to plaintiff — Whether first defendant breached master tenancy agreement due to failure to deliver vacant possession — Whether rental proceeds earned by first, second and third defendants held in trust for plaintiff

Tort — Conspiracy — Conspiracy to injure plaintiff — Defendants entered into tenancy agreements on subject property despite master tenancy agreement still subsisting between plaintiff and first defendant — Whether tort of conspiracy proven against defendants

The respondent/plaintiff had entered into a master tenancy agreement ('the MTA') of the subject property with the first defendant in the court below. Whilst the MTA was still subsisting, the first defendant had entered into another tenancy agreement with the third defendant and the third defendant in turn entered into a subtenancy agreement with the fourth defendant. The plaintiff subsequently sued the appellants/defendants for breach of contract and tort of conspiracy. At the end of the proceedings, the learned trial judge found in favour of the plaintiff and declared that the tenancy agreement between the third defendant and the fourth defendant was invalid. Hence, this appeal. The grounds of appeal as submitted by the defendants were that, the learned trial judge erred in law and in fact in deciding: (a) that the plaintiff had proven its claim of tort of conspiracy to injure against all the defendants; (b) that delivery of vacant possession of 1,234,197 sqft of the subject property must be given to the plaintiff; and (c) that the rentals received by the first, second and third defendants were held in trust by them respectively as constructive trustee for the plaintiff.

Held, allowing the first and third grounds of appeal and dismissing the second ground of appeal with costs of RM10,000 to the fourth defendant:

(1) From the evidence, the predominant purpose of all the tenancy agreements was the lawful promotion of the defendants' lawful interest. None of the facts relied upon by the plaintiff justify or even support an inference of dishonest participation by the first defendant and other defendants to injure the plaintiff. The plaintiff failed to adduce sufficient evidence to establish a conspiracy among the defendants. A party who alleges a fact has the burden of proving it and mere allegation is not evidence. The evidence to prove this allegation must be clear, positive and convincing (see paras 16 & 21).

(2) The court agreed with the learned trial judge's finding that vacant possession of the said subject property meant possession of 1,234,197 sqft as stipulated in the MTA agreement. The court must give effect to the intention of the parties as embodied in the terms of the MTA. Based on the evidence, only the keys to the main gate ('Post 1') and lobby office ('Admin 3') were given by the first defendant to the plaintiff, the remaining areas in the said subject property were not handed to the plaintiff. Thus, the first defendant had breached the MTA by failing to deliver vacant possession. The court ordered that the matter in respect of the breach of the MTA be remitted back to the High Court for assessment of damages (see paras 30 & 32–36).

(3) The plaintiff had failed to lead any evidence that: (a) it was contractually entitled to any of the rental proceeds under the tenancy agreement; or (b) it had sourced or earned the rental proceeds; or (c) that the plaintiff could have procured similar rentals to the rental rates paid by the third and/or fourth defendants or any rentals received by the first defendant. Thus, the rentals received by the first, second and third defendants were not held on trust by them as constructive trustees for the plaintiff (see paras 37–38).

(4) In light of the court's decision that it was the first defendant who was in breach of the MTA in failing to give vacant possession of the subject property to the plaintiff, the cross-appeal by the first defendants that the MTA was deemed terminated and unenforceable was not maintainable and should be dismissed (see para 42).

[Bahasa Malaysia summary

Responden/plaintif telah memasuki perjanjian penyewaan utama ('PPU') terhadap hartanah dengan defendan pertama di mahkamah bawahan. Sementara PPU masih wujud, defendan pertama telah memasuki perjanjian penyewaan yang lain dengan defendan ketiga dan defendan ketiga sebaliknya memasuki perjanjian sub penyewaan dengan defendan keempat. Plaintif kemudiannya menyaman perayu-perayu/defendan-defendan bagi kemungkiran kontrak dan tort konspirasi. Pada akhir prosiding, hakim perbicaraan yang bijaksana memihak plaintif dan mengisytiharkan bahawa perjanjian penyewaan di antara defendan ketiga dan keempat adalah tak sah.

Maka rayuan ini. Alasan rayuan seperti yang dihujahkan oleh defendan-defendan adalah bahawa, hakim perbicaraan yang bijaksana tersilap dari segi undang-undang dan fakta dalam memutuskan: (a) bahawa plaintif telah membuktikan tuntutan tort konspirasinya untuk merosakkan kesemua defendan; (b) bahawa pemberian milikan kosong sebanyak 1,234,197 kaki persegi hartanah mesti diberikan kepada plaintif; dan (c) bahawa sewa yang diterima oleh defendan pertama, kedua dan ketiga adalah dipegang atas amanah oleh mereka masing-masing sebagai pemegang amanah konstruktif bagi plaintif.

Diputuskan, membenarkan alasan rayuan pertama dan ketiga dan menolak alasan rayuan kedua dengan kos sebanyak RM10,000 kepada defendan keempat:

(1) Daripada keterangan, tujuan utama kesemua perjanjian penyewaan adalah promosi sah terhadap kepentingan sah defendan-defendan. Tiada satu fakta pun yang digunakan oleh plaintif menjustifikasikan atau menyokong inferens penyertaan tidak jujur oleh defendan pertama dan defendan-defendan lain untuk merosakkan plaintif. Plaintif gagal untuk mengemukakan keterangan yang mencukupi untuk membuktikan konspirasi di antara defendan-defendan. Pihak yang mendakwa fakta mempunyai beban untuk membuktikannya dan dakwaan semata-mata bukan keterangan. Keterangan untuk membuktikan dakwaan ini mestilah jelas, positif dan meyakinkan (lihat perenggan 16 & 21).

(2) Mahkamah bersetuju dengan dapatan hakim perbicaraan bahawa milikan kosong hartanah tersebut bermaksud pemilikan sebanyak 1,234,197 kaki persegi seperti yang ditetapkan di dalam perjanjian PPU tersebut. Mahkamah mesti memberi kesan kepada niat pihak-pihak seperti yang terangkum di dalam terma-terma PPU tersebut. Berdasarkan atas keterangan, hanya kunci-kunci kepada pintu utama ('Post 1') dan pejabat lobi ('Pentadbiran 3') diberikan oleh defendan pertama kepada plaintif, bahagian lain dalam hartanah tersebut tidak diberikan kepada plaintif. Oleh itu, defendan pertama telah memungkiri PPU kerana gagal untuk memberikan milikan kosong. Mahkamah memerintah perkara berkaitan kemungkiran PPU diremit kembali ke Mahkamah Tinggi bagi penaksiran ganti rugi (lihat perenggan 30 & 32–36).

(3) Plaintif telah gagal untuk menunjukkan apa-apa keterangan bahawa: (a) ia berhak secara kontraktual kepada apa-apa hasil sewa di bawah perjanjian penyewaan tersebut; atau (b) ia telah mendapat atau memperoleh hasil sewa; atau (c) bahawa plaintif boleh memperolehi sewa yang sama kepada kadar sewa yang dibayar oleh defendan ketiga dan/atau keempat atau apa-apa sewa yang diterima oleh defendan pertama. Oleh itu, sewa yang diterima oleh defendan pertama, kedua dan

ketiga tidak dipegang atas amanah oleh mereka sebagai pemegang amanah konstruktif bagi plaintif (lihat perenggan 37–38).

(4) Berdasarkan keputusan mahkamah bahawa ia adalah defendan pertama yang melanggar PPU kerana gagal untuk memberi milikan kosong hartanah kepada plaintif, rayuan balas oleh defendan pertama bahawa PPU dianggap ditamatkan dan tidak boleh dikuatkuasa tidak dapat dipertahankan dan patut ditolak (lihat perenggan 42).]

Notes

For cases on breach of tenancy agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7025–7030.

For cases on conspiracy to injure plaintiff, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 90–92.

Cases referred to

Arnold v Britton and others [2015] 2 WLR 1593, SC (refd)

BCCI v Ali and Others [2000] 2 Costs LR 243, HC (refd)

Gallant Acres Sdn Bhd v Kepong Development Sdn Bhd [2004] MLJU 398; [2004] 1 LNS 333, HC (refd)

Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor [2015] 6 CLJ 449, CA (refd)

Leha binte Jusoh v Awang Johari bin Hashim [1978] 1 MLJ 202, FC (refd)

Lonrho plc v Fayed [1991] 3 All ER 303, HL (refd)

Milicent Rosalind Danker and Anor v Malaysia-Europe Forum Bhd & Ors [2012] 2 CLJ 1076, HC (refd)

NYK Logistics (UK) Ltd v Ibrend Estates BV [2011] EWCA Civ 683, CA (refd)

OBG Ltd v Allan [2008] 1 AC 1, HL (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)

Topfell Ltd v Galley Properties Ltd [1979] 1 WLR 446, Ch D (refd)

YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd) [2015] SGCA 55, CA (refd)

Legislation referred to

Universities and University Colleges Act 1971

Appeal from: Civil Appeal No 22ncvc-1383–11 of 2012

K Mohan (K Prakash and S Kalashi with him) (Mohanadass Partnership) in Civil Appeal No B-02(NCVC)(W)-993–06 of 2015 for the appellant.

Manian Raju (Mohd Farid bin Ismail and Zatul Azra bt Zulkeflee with him) (Hamidi & Farid) in Civil Appeal No B-02(NCVC)(W)-1100–07 of 2015 for the appellant.

Justin Voon (CP Lee and Sam How with him) (Justin Voon Chooi & Wing) in Civil Appeal Nos B-02(NCVC)(W)-993–06 of 2015 and

B-02(NCVC)(W)-1100–07 of 2015 for the respondent.

Mohd Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] For ease of reference, in the judgment, we will refer to the appellants as 'defendants' and the respondent as 'plaintiff'.

[2] These appeals have been filed against the common judgment and order dated 10 June 2015 given by the Shah Alam High Court in Civil Suits Nos B-02(NCVC)(W)-993–06 of 2015, B-02(NCVC)(W)-1100–07 of 2015 and B-02(NCVC)(W)-1101–07 of 2015. By the said impugned judgment, Her Ladyship granted judgment in favour of the plaintiff against all the defendants and dismissed the first defendant's counterclaim.

[3] Her Ladyship held that the plaintiff had proven its case against the defendants for breach of contract as well as its claim of tort of conspiracy to injure against all the defendants and ordered a compensation sum of RM6,299,971.72 with 5% interest per annum from the date of the writ to the date of satisfaction. Further, Her Ladyship declared that the tenancy agreement dated 3 January 2011 between the third defendant and the fourth defendant was invalid.

[4] Dissatisfied, all the defendants appealed to this court but the second defendant's appeal was struck out on 4 November 2015.

PARTIES

[5] The parties at the High Court are as follows:

Plaintiff	Defendants
MKC Corporate & Business Advisory Sdn Bhd	1. Cubic Electronic Sdn Bhd
	2. Goh Seng Chong
	3. Mars Telecommunication Sdn Bhd
	4. Universiti Teknikal Malaysia Melaka

FACTS OF THE CASE

[6] Shorn of unnecessary details, the material facts giving rise to these appeals may be shortly stated as follows:

(a) the plaintiff and first defendant are private limited companies incorporated in Malaysia. The first defendant was a registered owner of a land situated at Mukim Bukit Katil, District of Melaka Tengah, Melaka ('the subject property');

(b) the second defendant is the director and the majority shareholder of the first defendant;

(c) the plaintiff and the first defendant entered into the master tenancy agreement ('the MTA') for a period of three years commencing from 12 August 2009 and expiring on 11 August 2012 where the first defendant was to let out the subject property to the plaintiff;

(d) pursuant to the MTA, the plaintiff paid a security deposit of RM500,000 and utility deposit of RM50,000 to the first defendant. A monthly rental of the subject property was fixed at RM250,000;

(e) according to the plaintiff, whilst the MTA was still subsisting, the first defendant had entered in to a tenancy agreement dated 14 January 2011 with the third defendant over the same subject property with monthly rental of RM116,099.25;

(f) prior to that, the third defendant had entered into a subtenancy agreement dated 3 January 2011 with the fourth defendant with monthly rental agreed at RM1,486,070.40, also over the same subject property;

(g) the plaintiff averred that the first and second defendants together with the third and fourth defendants had conspired to deprive the plaintiff of its right under the MTA;

(h) the plaintiff further averred that the first defendant had breached the MTA by failing to give vacant possession of the subject property to the plaintiff. Consequently, the plaintiff initiated this action; and

(i) the defendants resisted the suit and filed their respective statements of defence. The first defendant alleged that the plaintiff had failed to pay the rental and refused to take vacant possession. Therefore, the first defendant by its solicitor's letter dated 31 March 2011, terminated the MTA. The first defendant filed a counterclaim against the plaintiff seeking, inter alia, for a declaration that the MTA dated 12 August 2009 between the first defendant and the plaintiffs was be deemed terminated and unenforceable.

THE APPEAL

[7] The memorandum of appeal raised several grounds to assail the impugned judgment but before us the arguments were centered mainly on the following:

A (a) the learned trial judge erred in law and in fact in deciding that the plaintiff had proven its claim of tort of conspiracy to injure against all defendants;

(b) the learned trial judge erred in law and in fact in holding that delivery of vacant possession of 1,234,197 sqft. of the subject property must be given to the plaintiff; and

(c) the learned trial judge erred in law and in fact in deciding that the rentals received by the first defendant and second and third defendants are held in trust by them respectively as constructive trustee for the plaintiff.

ANALYSIS AND DECISION

First ground

[8] The plaintiff submitted that the first defendant had deliberately stalled the delivery of vacant possession of the subject property to the plaintiff and meanwhile had 'back door' dealing with the third defendant and fourth defendant to deprive the plaintiff of its rights and entitlements under the MTA. According to the plaintiff, the first defendant and other defendants had entered into five agreements whilst the MTA was still existing and still on foot without the plaintiff's knowledge. Therefore, there was a conspiracy and/or fraud among all the defendants to completely deprive the plaintiff of its right under the MTA.

[9] The learned trial judge found in favour of the plaintiff and awarded damages. Her Ladyship had this to say at p 37 of 'Ikatan Teras Penghakiman Perayu':

> The first, second and third defendants had one common interest namely to make money because they are not financially stable. The fourth defendant had the money and was badly in need for premises to house its students. The fourth defendant agreed to pay rental of RM1,486,070.40 for 464,397 sqft. and wanted a tenancy for three years. Compared to the RM250,000 rental payable by the plaintiff for the entire property, the first to third defendants saw the opportunity of making monies. There is a rental proceeds of RM1,236,070.40 (RM1,486,070.40 – MR250,000). This is a huge sum. For 36 months, the rental is RM44,498,534.40. Realising the amount of monies about to be made if the plaintiff sign an agreement with the fourth defendant, they decided to grab monies themselves.

[10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the 'economic torts'. There are four elements to a conspiracy claim:

(a) a combination or agreement between two or more individuals;

(b) an intent to injure;

(c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and

(d) resulting loss and damage to the claimant.

(See *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] 6 CLJ 449 (CA).)

[11] There are two kinds of conspiracy, the elements of which are distinct:

(a) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

(b) lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done with the sole predominant purpose of injuring the claimant — it is in the fact of the conspiracy that the unlawfulness resides (see *Milicent Rosalind Danker and Anor v Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho plc v Fayed* [1991] 3 All ER 303 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for unlawful means conspiracy and lawful means conspiracy are as follows:

> A combination or agreement between two or more individuals
>
> It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, albeit tacitly, to achieve a common end (*R v Siracusa* [1990] Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the

surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design (*R v Simmonds* [1969] 1 QB 691).

It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*Keefe v Walsh* [1903] 2 IR 681).

[14] In these instant appeals, we are concerned with lawful means conspiracy. The element of lawful means conspiracy are the same as for unlawful means conspiracy detailed above, with the exception of the intention to injure requirement:

An intention to injure

For lawful means conspiracy, it is necessary to prove that the conspirators had the sole or predominant intention of injuring the claimant. As it was put in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435: If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person.

The mental element of intention to injure the claimant will be satisfied where the defendant intends to injure the claimant either as an end in itself or as a means to an end such as to enrich themselves or protect or promote their own economic interests. It will not be satisfied where injury to the claimant is neither a desired end nor a means of attaining it but merely a foreseeable consequence of the defendants' actions.

[15] In *OBG Ltd v Allan* [2008] 1 AC 1, Lord Nicholls held at p 57:

166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 at p 360 the majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.

[16] Tested on the backdrop of aforesaid enunciation of the legal principles, on the evidence available on record, we are not prepared to hold that there was a conspiracy between the defendants when they entered into the tenancy agreements. The predominant purpose of those tenancy agreements are the lawful promotion of their lawful interests.

[17] In so far as the fourth defendant is concerned, it had entered into a tenancy agreement dated 3 January 2011 with the third defendant for the purpose of securing premises for its two new faculties and incoming students. The fourth defendant is a public university established under the Universities and University Colleges Act 1971 (Act 30). It is pertinent to note that the fourth defendant had been renting a part of the premises since 2005, well before the plaintiff came into picture in 2009.

[18] The nub of the plaintiff's case is that all the defendants had entered into all kinds of agreements among themselves while the MTA was still existing and not terminated and none of the defendants could explain to the court how much rental was actually paid; how it was paid and to whom it was paid to.

[19] We have painstakingly and carefully scrutinised the evidence on record and find no evidence to support the plaintiff's contention that the rental paid by fourth defendant was for first defendant's ultimate benefit or that the first, second and third defendants must have a share in the profits. With respect, the learned trial judge's finding is against the weight of the evidence presented at the trial and merely grounded on pure fanciful conjuncture.

[20] Lest we be accused of an oversight, we must say that we are mindful of the fact that in conspiracy cases of this type, it would be difficult to prove by direct evidence. The plaintiff is never required to show the existence of the arrangements between the conspirators in the nature of an express agreement, whether formal or informal. Therefore, as is often the case, the agreement or combination is to be inferred from the evidence.

[21] We have given anxious consideration to facts and circumstances relied upon by learned counsel for the plaintiff in support of his contention that the first defendant had conspired with other defendants to injure the plaintiff. We are of the view that none of those facts or circumstances, taken singly or together, justify or even support an inference of dishonest participation by the first defendant and the other defendants to injure the plaintiff. The plaintiff failed to adduce sufficient evidence to establish a conspiracy among the defendants. We reiterate that a party who alleges a fact has the burden of proving it and mere allegation is not evidence. It must be stressed that the evidence to prove this allegation must be clear, positive and convincing.

[22] Therefore, the conspiracy claim against the defendants failed and the defendants' appeal on ground (a) must succeed.

Second ground

[23] Learned counsel for the first defendant submitted that the learned trial judge failed to adequately appreciate contemporaneous evidence and witness testimony in concluding that delivery of vacant possession of 1,234,197 sqft of the subject property must be given to the plaintiff.

[24] Learned counsel for the first defendant posited that the term 'vacant possession' of the subject property is not defined in the MTA. Instead, the agreement stipulates that the delivery of vacant possession of the subject property is subject to existing subtenancies with IAC Manufacturing Sdn Bhd and Mitsui-Soko Sdn Bhd. Thus, there could never be a situation where the entire 1.2m sqft of the subject property would be delivered to the plaintiff, wholly vacant.

[25] Learned counsel further contended that the plaintiff's assertion in oral testimony that vacant possession was not delivered is contradicted by documented admissions as follows:

(a) by the plaintiff's letter dated 9 November 2010 in which the plaintiff expressly admitted that 'vacant possession of the factory had already been given to us vide Cubic's letter dated 6 April 1010'; and

(b) by the plaintiff's second letter of even date in which the plaintiff said:

> ... we wish to inform you we have entered the factory this afternoon and we wish to thank you for acknowledging our right of possession over the factory as per the tenancy agreement mentioned above.
>
> Further, since vacant possession was only delivered to us today it is only appropriate that the total rental payable shall be pro-rated accordingly.

[26] According to learned counsel, the following conducts of the plaintiff fly in the face of its denials of not having received possession of the subject property:

(a) the plaintiff in its capacity as the main tenant, began negotiating with the R&M, among others, the rent to be paid by the first defendant over the space within which the first defendant occupied;

(b) the plaintiff did not seek refund of the payment of RM59,456 purportedly paid towards April, September and October 2010 rental;

(c) the plaintiff handed over the keys to the main gate ('Post I') and lobby office and Admin 3 to the first defendant on 6 April 2010;

(d) the plaintiff set up its own office within the premises of the subject property;

(e) the plaintiff admitted in its pleading that they did pay a sum of RM59,456 monthly rental payable under the MTA for April 2010;

(f) the plaintiff installed signboards on the subject property;

(g) the plaintiff was given full control of the subject property by the R & M;

(h) the plaintiff went ahead and tenanted out other certain areas in the subject property to one PC Marine System Sdn Bhd and one Protection Technologies (M) Sdn Bhd; and

(i) by letter dated 6 January 2011, the plaintiff informed the third defendant that it is the master tenant of the subject property and it had effectively taken full possession of the subject property with effect from January 2011.

MEANING OF VACANT POSSESSION

[27] Before we proceed to consider the submissions it is perhaps useful to discuss the meaning of 'vacant possession'. The phrase 'vacant possession' has never been authoritatively defined. The meaning of the word 'vacant possession' has been said to vary according to the context in which they are used (see *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446; *Gallant Acres Sdn Bhd v Kepong Development Sdn. Bhd.* [2004] MLJU 398; [2004] 1 LNS 333).

[28] The obligation to give vacant possession consists of both a legal and factual dimension. Where a vendor expressly or impliedly contracts to convey a property free from encumbrances, the purchaser shall on completion obtain the legal right to actual possession of the property transferred. However, the term 'vacant possession' goes beyond the legal transfer of the property. It also concerns possession in a factual sense of the property — the purchaser would be given such substantial, actual and empty possession as would allow him to occupy and use the property transferred without any impediments.

[29] In *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA Civ 683 (CA), the English Court of Appeal had to consider whether a tenant had given possession of property to the landlord. The lease contained a break clause allowing the tenant to give notice to terminate the lease. One of the conditions for the valid exercise of the break right was that the tenant had to give vacant possession of the property to the landlord on the date when the lease was to come to an end. The tenant served the notice under the break clause. Its workman and security guards remained on the property for several days after the date specified in the notice. They did so in order to finish off the repairs that the landlord and tenant had agreed were necessary. It was held that the tenant

had not given vacant possession (and that it had not effectively brought the lease to and end). Rimer CJ explained 'vacant possession' means that, at the moment that 'vacant possession' is to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must be also be empty of chattels, although the obligation in this regard is likely only to be breached if any chattels left on the property substantially prevent or interfere with the enjoyment of the right to possession of a substantial part of the property (at p 44).

[30] We are in full agreement with the learned trial judge's finding that vacant possession of the said subject property meant possession of 1,234,197 sqft. We find support in s 6(a) of the First Schedule of the MTA which states, inter alia, that the reserved rental of RM250,000 per month is for an existing areas of 1,234,197 sqft and the first reserved rental shall be made within 14 days from the delivery of vacant possession.

[31] We also find support in s 18 of the Second Schedule of the MTA which further states, inter alia, that the plaintiff had acknowledged the existing tenancy between the first defendant and IAC Manufacturing Malaysia Sdn Bhd as well as the tenancy with Mitsui-Soko Sdn Bhd and it was an agreed term that the rentals of these two tenancies shall be paid directly to the plaintiff and the first defendant has the obligation to notify and secure confirmation of the same.

[32] Uncontroverted evidence established that on 9 April 2010, only the keys to the main gate ('Post 1') and lobby office ('Admin 3') were given by the first defendant to the plaintiff. The remaining areas such as 'Factory 1', 'Factory 2', 'Admin 1', 'Admin 2', remaining areas of 'Admin 3', remaining areas of 'Manufacturing Admin 1', remaining areas of 'Factory 3', remaining areas of 'Factory 1', and remaining areas of 'Logistic 1 & 2' in the said subject property were not handed to the plaintiff and the first defendant's service providers were still operating in the said subject property. The first defendant themselves were occupying 123,800 sqft at all material time.

[33] In our opinion, the areas of the subject property that the first defendant is obliged to give vacant possession to the plaintiff are clearly stipulated in the MTA. The court must give effect to the intention of the parties as embodied in the terms of MTA. While the relevant context is important, the text of the agreement ought always to be the 'first port of call' (see *Arnold v Britton and others* [2015] 2 WLR 1593 (UKSC); *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] SGCA 55).

[34] In *BCCI v Ali and Others* [2000] 2 Costs LR 243, Lord Bingham of Cornhill summarised the canons of construction and the approach to be adopted by a court in interpreting contracts as follows:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective state of mind but makes an objective judgment based on the materials already identified.

[35] We find no reason to disturb the finding of facts by the learned trial judge that no vacant possession of the subject property was given by first defendant to the plaintiff. As such, the first defendant had breached the tenancy agreement by failing to deliver vacant possession.

[36] Consequently, we order that the matter in respect of the breach of the MTA be remitted back to the High Court for assessment of damages by deputy registrar or senior assistant registrar, as the case may be.

Third ground

[37] The learned trial judge declared that the rentals received by the first and second and third defendants are held on trust by them respectively as constructive trustees for the plaintiff.

[38] With respect, we are of the opinion that the learned trial judge fells into serious error. The plaintiff had failed to plead or lead any evidence that: (a) it was contractually entitled to all any of the rental proceeds under the tenancy agreement; or (b) it had sourced or earned the rental proceeds which it claims must be held on trust for the plaintiff by the first respondent; or (c) that the plaintiff could have procured similar rentals to the rental rates paid by the third and/or fourth defendants or any rentals received by the first defendant.

[39] We agree with the submission of learned counsel for the first defendant that the plaintiff merely seeks to reap the benefits of first defendant's efforts whether through the RPM or the liquidator in:

(a) securing rent-paying tenants to occupy the subject property;

(b) operating and maintaining the subject property;

(c) retaining and paying for the services of the service providers including that of the security guards, cleaners, etc; and

(d) paying for all basis necessities to operate the subject property attending to statutory requirements such as lift, maintenance, paying annual quit and assessment rents, etc.

[40] We cannot comprehend the train of reasoning of the learned trial judge in finding that the tenancy agreement dated 14 January 2011 was invalid and at the same time declared that the rentals paid by the third and fourth defendants belonged to the plaintiff. It is trite that one cannot enforce an agreement which is void ab ibnitio (*Leha binte Jusoh v Awang Johari bin Hashim* [1978] 1 MLJ 202).

[41] We, therefore, set aside the findings of the learned trial judge which relate to constructive trust.

COUNTERCLAIM

[42] The first defendant's counterclaims are premised on the basis that the MTA is deemed terminated and unenforceable and that either party has the existing right to assert over the MTA. In the light of our decision that it was the first defendant who was in breach of MTA in failing to give vacant possession of the subject property to the plaintiff, the cross-appeal is not maintainable and should be dismissed.

COSTS

[43] In respect of Civil Appeal No B-02(NCVC)(W)-993–06 of 2015, we made no order as to costs and the costs awarded by the High Court is reduced to RM52,000.

[44] In respect of Civil Appeal No B-02(NCVC)(W)-1100–07 of 2015, we award the costs of RM10,000 to the appellant. Deposits to be refunded.

First and third grounds of appeal allowed; second ground of appeal dismissed with costs of RM10,000 to fourth defendant.

Reported by Dzulqarnain Ab Fatar